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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 26 2010

LIN 07 208 50761

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer design and information technology services company. It seeks to employ the beneficiary permanently in the United States as a hardware engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the beneficiary holds a Master's degree and the requirements of the labor certification falls within the "advanced degree" requirements of section 203(b)(2) of the Act. For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree is the minimum level of education required. Line 8 indicates that the petitioner would accept a combination of education or experience in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Specifically, the petitioner indicated in line 8-A that a "3-yr college with PG diploma [would be accepted] as BS equivalent" with five years of experience.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or ***a*** foreign equivalent degree above that of baccalaureate. ***A*** United States baccalaureate degree or ***a*** foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

(Emphasis added). Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate of the foreign equivalent. The petitioner indicated that its alternate requirement was only three years of college plus a post graduate diploma was required, which would result in the equivalent of a bachelor's degree based on a combination of education and would not state a requirement for a degree based on a single program of study. Thus, as the educational requirement and its alternative requirement fail to state requirements consistent with the regulations, the position does not require a member of the professions holding an advanced degree.

On appeal, counsel argues that an equivalent to a United States baccalaureate degree, i.e. a three year college degree plus a post graduate diploma, should be accepted under the regulations. The regulatory language of 8 C.F.R. § 204.5(k)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the advanced degree classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree plus five years of experience in order to be qualified as a professional for second preference visa category purposes.

Counsel submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efren Hernandez III of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). Within the July 2003 letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree. Counsel also submitted two sets of meeting notes between the American Immigration Lawyers Association (AILA) and the NSC Liaison Committee giving guidance to AILA members to assist in filing their employment based petitions. These meeting notes indicate that equivalent education may be accepted for a bachelor's degree or master's degree although "[e]ach petition and its supporting documentation are examined on a case-by-case basis and degree equivalencies are based on the evidence presented with the individual case."

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced in Mr. Hernandez' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In *Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. 17 I&N Dec. at 245.

Counsel also refers to an AAO non-precedential, *In Matter of* A96 146 275, NSC (AAO July 13, 2007). In the non-precedential decision, the AAO determined that the beneficiary's bachelor of commerce degree from an Indian university coupled with his membership in the Indian Institute of Chartered Accountants did not constitute a "foreign equivalent degree" that would equate to a United

States bachelor's degree under 8 C.F.R. § 204.5(k)(2). Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the non-precedential case cited. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Lastly, counsel argues that the terms of the labor certification are moot because the beneficiary actually holds a Master's degree and thus would qualify as a member of the professions holding an advanced degree. The beneficiary's qualifications, however, are irrelevant to the inquiry as to whether the I-140 petition was properly filed as a position requiring an advanced degree. The petitioner states alternate requirements, which both do not meet the standard for a position requiring an advanced degree. Thus, the position does not require an individual holding an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.